STATE OF MICHIGAN

COURT OF APPEALS

GENEVA HICKEY,

Plaintiff-Appellant,

v

ADLER'S FOODTOWN, INC.,

Defendant-Appellee,

and

ADLER'S FOODTOWN, INC.,

Third-Party Plaintiff,

v

G & C Properties, Ltd.,

Third-Party Defendant.

UNPUBLISHED
March 27, 2003

No. 236036
Oakland Circuit Court
LC No. 00-020188-NO

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Plaintiff Geneva Hickey appeals by right from an order granting summary disposition to defendant Adler's Foodtown, Inc. ("Adler's") under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

Plaintiff filed a complaint against Adler's on January 13, 2000, alleging that on September 7, 1998, she slipped and fell on an accumulation of water while shopping in Adler's store in Oakland County. The complaint alleged that the store's roof had been leaking "[f]or some time prior to Plaintiff's entrance into Defendant's premises" and that "Defendant was aware of the leaking roof and knowingly failed" to direct customers away from the accumulated water, to warn customers of the dangerous condition, or to remove the dangerous condition. The complaint alleged that plaintiff incurred "serious and permanent injuries to her knees" and "other

parts of her body" as a result of her fall. Plaintiff claimed three causes of action: negligence, gross negligence, and nuisance.[1]

On December 2, 2000, Adler's filed a third-party complaint against its landlord, G & C Properties, Ltd. ("G & C"), claiming that G & C had been responsible for keeping the roof of the store in good repair and that it, not Adler's, should be liable for any damages incurred by plaintiff. On February 2, 2001, plaintiff filed an amended complaint adding G & C as a primary defendant in the case.[2] Plaintiff claimed two causes of action with regard to G & C: negligence and gross negligence.

On May 16, 2001, an entity named "Highland Town Center Associates, Inc." ("Highland") later claimed that it, and not G & C, owned the premises in question on the date of the alleged accident. Although the record does not indicate that Highland was added as a party to the lawsuit, Highland nonetheless filed a counter-claim against Adler's on June 11, 2001, claiming that "[a]t the time of the Plaintiff's alleged injury, Adler's and Highland were parties to a lease agreement which required Adler's to procure insurance for the benefit of Highland and to release and hold harmless Highland from claims of personal injury, such as the one described in the principal complaint."

On May 18, 2001, Adler's moved for summary disposition against plaintiff under MCR 2.116(C)(10), arguing that the accumulation of water on which plaintiff allegedly slipped and fell was open and obvious as a matter of law. Plaintiff filed a brief in response to Adler's motion on June 13, 2001, arguing that her cause of action was viable because Adler's admitted in a letter to Highland that the roof leak posed a risk to customers and because the puddle of water was not clearly visible to customers, given the clear color of the water, the light-colored floor, and the pole and display rack that impeded a view of the water.

Plaintiff attached three letters to her responsive brief. A letter from plaintiff's doctor dated August 14, 2000, indicated that plaintiff suffered damage to her knees because of the fall. In a March 18, 1999, letter from an agent of Adler's to Highland, the agent, Robert Roth, stated that "I once again cannot believe that you have not responded to our call to fix the leaking roof." In a March 8, 1999, letter from Roth to Highland, Roth states that "the roof is still leaking and we have had a customer slip & fall in our store. I think we have handled the customer properly, but someone will be hurt again and we have lost many potential customers because [of] the leaky roof."

Plaintiff also attached to her brief excerpts from several depositions. Robert Cleveland, apparently an Adler's employee, testified that the area in which plaintiff allegedly fell was "moist" for "the complete width of [an] aisle . . . ." He stated:

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[1] Early in the proceedings, Adler's filed a motion for partial summary disposition, arguing that the nuisance claim was not viable. The trial court granted the motion, and plaintiff does not currently challenge the dismissal of the nuisance claim.

[2] The parties stipulated to the addition of G & C as a primary defendant.

> I mean when it was on the floor when I first recognized it it was at least the length of this four to six feet of the width of the aisle and probably two or three feet of the length and that is how much water was there but when you take a mop and clean up the water you are not – like I said, you can only get so much water up with the mop. It's still going to be damp and moist unless you get on the ground with paper towels and blow driers. It's still going to be – you got to proceed with caution through there.

He added that the floor in question was made from "square tile" and that it was waxed and buffed regularly. He stated, "probably if the floor had been more dirty it probably would have been less of a problem but when you strip it and re-wax it then the floor actually becomes even – looks better but it's more slippery." Cleveland also testified that "there was a wet floor sign to caution [sic]" and that the leak was occurring "[n]ot too far from" a structural pole. He stated that a store employee mopped some of the water before plaintiff's alleged fall but that the floor had not been totally dry. He testified:

> Once he cleaned it up I knew it was moist there and see it was still raining and the door is opening. The floor is not going to dry when it's raining. The water is not going to evaporate totally off that floor. It's still going to be moist through that area but the mop bucket and mop was [sic] not in the aisle. I could see where it would be obscured because I have tables. The mop bucket would have been around the corner.

` Roland Barnard, apparently another Adler's employee, testified:

> This leak here, I didn't know nothing about it until somebody come in the back room and said there was some lady laying [sic] in the floor out here. And when I went out there, there was a mop there and somebody had mopped up the floor and there was a yellow cone that says like caution, wet floor, and this lady was laying [sic] on the floor.

Barnard stated that when he saw plaintiff on the floor, he also saw a yellow mop bucket and a yellow tall cone.

James North, Jr., the Adler's employee who mopped the area in question, agreed that the area was "still pretty slick" after he left it. North stated that the floor was "[a] white and tannish type of tile looking floor" but was not actually tile, that the floor's surface was hard, and that the water on the floor was clear. He testified that the mop and mop bucket he used that day were bright yellow. He also testified that the puddle, before being mopped, was "[a] couple of feet" in size.

Fred Ike, an Adler's employee, estimated that the roof of the store in question leaked "between six and 12 times" within the last year he worked there.[3] Ike testified that after her alleged fall, plaintiff stated that she had been in a hurry to shop. Ike also testified that plaintiff was "agitated."

[3] The dates of Ike's employment at the store were not specified.

During plaintiff's deposition, the following colloquies occurred:

Q. Once you entered the store, what did you do next?

A. I walked, when you walk in the door, I walked to that first aisle, it just curves right around.

Q. What's in that aisle?

A. On one side produce and on the wall side was sales items in like half boxes which they usually had set up there.

* * *

Q. Did you ever see the water?

A. No. I mean –

MR. SCHWARTZ [plaintiff's attorney]: Go ahead, continue, because he's asking you at any time either before or after.

A. At any time? When I fell, I was down in it.

Q. You saw water after you fell?

A. Yes. Sorry.

Q. That's okay. I want you to describe this for me. Was this a puddle? What did it look like, the water?

A. There was, it was like a puddle, yes.

Q. Was it like wetness on the floor or was there actually an accumulation of water?

A. There was an accumulation.

Q. About how large was the accumulation of water?

A. Well, I was – let's see. The majority of my clothes did get wet. So I would say the length of me which is like, I am five foot three and a half.

Q. So this puddle was five feet, approximately five feet in size?

A. Yes.

* * *

Q. Are you carrying any objects which obstruct your vision?

A. No.

Q. Is there anything obstructing your vision as you're walking down the aisle?

A. No. I'm just looking forward, straightforward.

Q. Is there anything obstructing where this caution cone was and where this bucket was, is there something that concealed it from you as you were walking down the aisle?

A. Yeah. They had some rack with some display items.

Q. That covered up the bucket and caution cone?

A. It was next to it. In the same vicinity as to it [sic].

Q. It concealed it, it blocked the cone and the bucket?

A. Yes.

On June 20, 2001, Adler's filed a reply brief, stating, among other things:

> Recall that by Plaintiff's own testimony, this puddle was *five feet in diameter*. The essence of Plaintiff's argument in response to this contention is that it is difficult to see water on a white tile floor. Everything else Plaintiff has argued in her response is superfluous. Defendant would concede that perhaps a smaller puddle of water would be more difficult to see, but a puddle of five feet in diameter simply could not be missed by anyone who is paying attention and watching where they are walking. . . . Plaintiff . . . is simply seeking to have Defendant fund her retirement. [Emphasis in original.]

Oral arguments occurred on July 11, 2001. The parties reiterated the positions set forth in their briefs, and the trial court ruled as follows:

> All right. The Court's reviewed these very extensive briefs, um, and this is a real hot issue, open and obvious. Um, it's a slip and fall accident that happened on September 7, 1998 at Adler's Foodtown in Highland. The sole issue is – is, as this Court finds it, is what constitutes open and obvious. Everybody agrees it's a five-foot in diameter puddle, somewhat near a structural pole in the produce aisle of Defendant's grocery store. Um, other than that, there don't appear to be any unique or unusual facts or circumstances and the Court is finding that that even – even if we assume arguendo that something obstructed Plaintiff's view of the bright yellow warning cone and bucket and mop, in light of the Plaintiff's own testimony regarding the size of the puddle, there is no genuine issue of material fact as to whether the condition on the premises constitutes open and obvious, and therefore the Court is granting summary disposition.

On July 11, 2001, the trial court issued an order granting Adler's motion for summary disposition against plaintiff. The additional claims filed by Adler's and by G & C/Highland were dismissed by stipulation.[4]

Plaintiff moved for reconsideration on July 25, 2001, stating that the dismissal of her suit had been unfair because the trial court had, on the same day it decided her case, denied a motion for summary disposition in a case involving nearly identical facts. Plaintiff stated, "Our legal system should treat cases that are substantially similar in a substantially similar manner." The trial court perfunctorily denied the motion for reconsideration.

On appeal, plaintiff argues that the trial court erred in granting the motion for summary disposition. We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition is appropriate if there is no genuine issue with regard to any material fact. *Id.* The court must not make its own determinations concerning witness credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff was an invitee because the store in question was held open for a commercial purpose. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). An entity is subject to liability for physical harm caused to invitees by a condition on its land only if the entity

> (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to such invitees; (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. [*Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995).]

However, this duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). Indeed, it does not extend to open and obvious dangers. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover on casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to

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[4] Although G & C was added as a primary defendant in the case, the parties have apparently concluded that the dismissal by stipulation of Adler's claim against G & C and the dismissal of plaintiff's claim against Adler's by the trial court impliedly dismissed plaintiff's claim against G & C. Indeed, no party on appeal argues that G & C remains a defendant in the case, and plaintiff does not list G & C as a defendant on the caption of her appellate brief.

protect invitees from harm presented by an open and obvious danger unless special aspects of the condition, e.g., something unusual about its character, location, or surrounding conditions, make the risk of harm unreasonable. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001) (footnote omitted).

Here, plaintiff allegedly fell in what she herself described as a "puddle" or an "accumulation" of water. Moreover, she herself described the accumulation of water as extending for approximately five feet, and she admitted that nothing obstructed her vision as she walked down the aisle of the store. Under these circumstances, we conclude that the danger posed by the accumulation of water was open and obvious as a matter of law.[5] Indeed, given its size, we believe that "an average user with ordinary intelligence" would be "able to discover" such an accumulation "upon casual inspection." See *Novotney, supra* at 475. Although plaintiff may not have actually seen the water, we emphasize that the test for an open and obvious danger is an objective one. See *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Moreover, we reject plaintiff's argument on appeal that the evidence demonstrated that the accumulation of water was obscured by a pole and by tables. Indeed, no evidence suggested that the pole obscured the water, and the testimony about the tables referred to the warning cone and a bucket being obscured. No one testified that the tables obscured the water itself. Finally, we reject plaintiff's contention that even if the water *had* been open and obvious, it posed an unreasonable risk of harm. Indeed, we simply cannot conclude that walking through an accumulation of water posed an especially high likelihood of severe harm, see *Lugo, supra* at 519. Therefore, the trial court did not err in granting Adler's motion.[6]

Plaintiff additionally argues that the trial court erred by failing to grant her motion for reconsideration. She reiterates that the trial court decided an additional case on the same day as it decided her case but reached a different conclusion on "almost identical" facts. Plaintiff contends that it was inequitable for the other case to be resolved differently than her case. We reject plaintiff's argument. First, plaintiff's motion for reconsideration, "by reasonable implication," merely reiterated the same issues already ruled on by the court. MCR 2.119(F)(3). Second, plaintiff cites no authority for the conclusion that cases involving similar facts decided on the same day must be resolved in an identical fashion.[7] See, generally, *Wilson v Taylor*, 457 Mich 232, 243; 564 NW2d 49 (1998).

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[5] In her appellate brief, plaintiff relies heavily on the case of *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689; 272 NW2d 518 (1978). We find *Jaworski* distinguishable and disagree that it requires a reversal of the trial court's decision in the instant case.

[6] We note that in reaching our decision, we have disregarded certain deposition excerpts attached to Adler's appellate brief because they were not included in the lower court record. A record may not be expanded on appeal. See *Samuel v Dep't of Mental Health*, 140 Mich App 101, 109, n 2; 364 NW2d 294 (1985).

[7] Moreover, the facts in the two cases in question are not identical. For example, a witness in the other case testified that "no puddles existed" at the time of the plaintiff's alleged fall.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter